

REMARKS

Claims 1-2, 4-45 and 47-53 remain pending in the present application. Claim 1 has been amended to include the limitations of now canceled claim 3, while claim 29 has been amended with the full support of the specification to include the limitations of now canceled claim 46. The amendments raise no new issues, add no new matter and require no additional searching. Even if the Examiner does not believe that the amendments place the application in condition for allowance, it is respectfully requested that the amendments be entered, as they would simplify issues for appeal.

Summary of Telephone Interview

An Applicant-initiated telephone conversation was held on January 14, 2004, between the Examiner and Michael Pritzkau, Applicant's counsel. Applicant's purpose was primarily to ascertain what the Examiner intended with respect to claims 48-53 which were presented in the response of September 2, 2003. The Final Office Action lists these claims as rejected, but contains no specific language directed to these particular claims. The Examiner expressed that the basis of the rejections was adequate to encompass these claims, with which Applicant disagrees.

The basis of reliance on the Herzing reference in the Final Office Action was discussed. The Examiner made clear her position that Herzing was relied on only to show that the type of fat as claimed is known in the art and, further, that it would have been obvious to use the fat depending upon the function intended. Applicant disagreed with this rationale and stated that Applicant has discovered the claimed function and that this functional behavior was heretofore unknown and, further, that the result of this functional behavior was unexpected. Applicant agreed to provide a Declaration which further describes comparative testing that is discussed in the present application and which was performed in the development of the present invention. The Examiner expressed concern that claim 1 does not set forth a functional limitation. Applicant directed the Examiner's attention to the functional language of claim 3, which depends directly from claim 1. The Examiner and Applicant were unable to reach any agreement with respect to the patentability of any of the pending claims.

The § 103 Rejections

The Examiner rejected Claims 1-53 under 35 USC 103(a) as being unpatentable over U.S. patent no. 3,690,898, issued to Partyka in view of U.S. patent no. 3,539,354, issued to Colvin; U.S. patent no. 4,562,079, issued to Herzing; U.S. patent no. 4,640,837 issued to Coleman; a book referred to as "Snacks and Sandwiches"; and an article entitled "Grilled Cheese: Plain and Simple." Applicant respectfully traverses. Claims 3 and 46 have been canceled, as described above.

Claim 1 has been amended to include the limitations of concurrently canceled claim 3 such that the reheatable product is reheated in a toasting environment to cause the high solid fat index layer to transfer heat into the interior of the food product by melting and resolidifying in a way which limits toasting of the outermost surfaces while absorbing into the product.

Applicant finds no rationale in the present Office Action that is addressed directly to these functional limitations. As Applicant understands, in attempting to meet these limitations, the Examiner relies on Partyka for the statement at column 3, lines 12-15, which reads:

SK-3

8

USSN 09/912,219

A preferred method of effecting heating is to grill the sandwich on both sides after applying a light coating of a suitable edible fat to the surface of the sandwich. Suitable edible fats include butter, margarine, salad oil, shortening or the like.

This fat is applied prior to grilling to produce browning such that this is the purpose to which the fat should be suited. The subject claim language, in contrast, requires reheating in a toasting environment.

The Examiner then admits that the layer recited by claim 1 is not disclosed by Partyka, but then states that:

It would have been obvious to one to substitute another type of fat depending on the function desiring [sic] to obtain or it would have been obvious to add additional fat depending upon the function desired.

Applicant disagrees with this rationale. In effect, the Examiner is stating that, so long as one has a concept for any desired or intended function, it would be obvious to use some material that functions in that manner, despite the fact that there is utterly no teaching in the prior art which recognizes that the material will actually function in that desired manner. That is, the use of the material may be taught for some other function that is unrelated to the desired function. Such reasoning is problematic and sweeps far too broadly, resulting in the impermissible rendering of all newly discovered functional behavior as obvious. As a hypothetical example, it would be desirable to cause water to function as a fuel for an internal combustion engine. Based on this desired function, a Hypothetical Applicant discovers that the addition of table salt to water produces a fuel that can be burned by an internal combustion engine. The rationale under discussion allows that, upon learning that table salt is known to function to melt water that is in solid form, it would be obvious to use table salt to make water function as a fuel, even though Hypothetical Applicant has made a remarkable discovery. This rationale completely brushes aside the actual inventive discovery, no matter how sweeping it might be. In the instant application, it is recognized that a layer of high solid fat index lipid functions in a highly advantageous way when used for reheating a product in a toasting environment, while the prior art teaches the use of this material for completely different purposes, as will be further described.

The Examiner justifies this line of logic with reference to the Colvin and Herzing patents by arguing that butter has a functional utility, as shown by Colvin, for precluding loss of moisture and for protecting the bread slices and then states:

It would have been obvious to one skilled in the art to enhance the functional use of the fat and still achieving the flavoring as [sic] the same time... The fat as claimed is known in the art as shown by Herzing. The use of a fat having a solid fat index will give a more effective barrier because the fat is more solid. (emphasis supplied)

Applicant finds this passage to be confusing since Applicant's invention is not directed to enhancing a known functional use of a fat, nor is the invention directed to flavoring in any way. The latter statement made by the Examiner in this passage is considered by Applicant as unsupported by the art of record. Colvin teaches the use of a suitable fat prior to grilling, while Herzing teaches the use of a matrix forming amount of hard butter to produce a savory coating. The present invention uses a hard butter to achieve a completely different function, with respect to both references. Applicant's invention is not directed to forming a more effective barrier, but is considered to serve in a heretofore unknown way. It should be understood that the properties of a high solid fat index material cause the layer of the present invention to quickly set up on the surface of the food product with limited penetration into the product surface to form a layer that has an opaque

appearance (see, for example, page 7, line 24 of the present application). Conversely, fats such as, for example, butter, having lower solid fat indexes will solidify much more slowly, thereby penetrating into the surface of the product and avoiding an opaque appearance. It is clear to Applicant that neither Colvin or Partyka would consider a high solid fat index lipid as being "suitable" for their purposes at least for the reason that it is not readily spreadable.

The Examiner asserts in the foregoing passage that Herzing shows the fat as claimed. Applicant disagrees. What Herzing teaches, when viewed as a whole, is the use of a matrix forming amount of hard butter in a savory confection-like coating. Applicant considers that, in the Herzing formulation, the amount of hard butter is insufficient for the intended purpose of claim 1, as amended. In this regard, Herzing limits the hard butter content at column 8, lines 17-18 to:

[B]roadly about 25-50% by weight of the total composition, preferably about 30-40%...

Repeatedly, Herzing describes his coating as a "confection-like" coating. Confection coatings are submitted to be sugar containing coatings that are applied to candies for purposes of producing a chocolate like layer or exterior coating. It is clear to Applicant, based on the Herzing disclosure, that the term "confection-like" is adopted by Herzing simply because the described savory coating is intended to be "substantially free of sugar" (see col. 3, ln. 41) and includes the flavor of a "meat, vegetable, fowl; or fish-food group" (see col. 3, lns. 44-45). In this regard, it is submitted that the savory confection-like coating of Herzing is not intended for reheating and, therefore, is not useful in the method recited by amended claim 1. Further, at col. 6, lns. 59-60, Herzing states:

Use of a matrix forming amount of hard butter resists moisture pickup and loss of ambient stability. (emphasis supplied)

The foregoing statement emphasizes a concern only for ambient stability. That is, the behavior of the savory coating at room temperature. Applicant is unable to find any teaching in Herzing with respect to the behavior of this coating at elevated temperatures and, particularly, in a toasting environment.

It is submitted that a product that supports a coating, having only a matrix forming amount of hard butter, will act in one of two ways. First, the coating will burn upon toaster heating, since the primary properties of such a matrix layer are attributable to the added ingredients, rather than the hard butter. That is, the dominant percentage of added ingredients will burn, assuming that they are combustible. Second, the coating may simply fall off of the product when warmed sufficiently. Applicant considers that some combination of these behaviors is virtually assured, based on the described composition of the savory coating. The various examples given in the Herzing patent recite hard butter content in its matrix layer of only up to 40 percent. Therefore, in these examples, the added ingredients comprise at least 60% of the matrix layer. Applicant disagrees that the mere presence of a hard butter in (1) a savory coating and (2) limited to a matrix forming amount, as taught by Herzing, is sufficient to support a combination with the remaining art of record in attempting to meet the limitations of amended claim 1.

It is well-settled in the case law that a reference must be taken in its entirety, including those portions which argue against obviousness. Moreover, it is impermissible within the framework of 35 USC § 103 to pick and choose from a reference only so much of it as will support a conclusion of obviousness to the exclusion of other parts necessary to a full

appreciation of what the reference fairly suggests to one skilled in the art. The courts have long cautioned that consideration must be given where the references diverge and teach away from the claimed invention.

It is submitted that the Herzing reference is clearly being given just such a proscribed treatment. The teaching of a coating, containing only a matrix forming amount of hard butter, has been singled-out to the exclusion of what the reference fairly teaches as a whole: a savory coating. That is, the Examiner is picking and choosing from the patent, with 20/20 hindsight, the mere use of a hard butter in a coating, in isolation from the remaining balance of the patent, in order to support a conclusion of obviousness.

When taken as a whole, Herzing fairly teaches a savory coating having a matrix forming amount of hard butter. Referring specifically to Herzing, the Examiner asserts that Applicant's argument with respect to the fact that Applicant's coating is not savory is not understood. This argument is completely relevant, in Applicant's view, since this is where the patent diverges and teaches away from the claimed invention. That is, Herzing, when taken as a whole, is directed to teaching a savory coating, whereas Applicant's coating is directed to a completely unrelated purpose (reheating) and is not savory, but rather is somewhat unpalatable when present as an overlying surface layer. If Applicant used the coating as taught by Herzing, it is submitted that the coating would be inoperable for its intended purpose. That is, it would burn and/or fall off, rather than producing the reheating characteristics that have been discovered by Applicant and as are recited in amended claim 1. In order to make out a proper rejection under § 103, there must be an objective teaching in the prior art to make the proposed modification. Clearly, there is no teaching in Herzing which reasonably suggests the method recited by claim 1, as amended. Applicant would have no motivation to look to Herzing in view of the fact that Herzing teaches an amount of hard butter which leads one directly away from Applicant's discovery and teaches nothing with respect to heating.

The high solid fat index layer of the present invention does not impart pleasant eating characteristics prior to reheating, savory or otherwise. Rather, it imparts an undesirable opaque appearance which would lead one directly away from applying such a layer to a product in the absence of some specific motivation to do so. For all of these reasons, it is submitted that Herzing is fatally flawed as a reference. Further, the art of record fails to disclose, teach or suggest the limitations of claim 1 in any reasonable combination. Therefore, allowance of claim 1 over the art of record is respectfully requested.

The patentability of the claims, in general, and claim 1, in particular, is further supported on the basis of the wholly unexpected behavior of the high solid fat index lipid layer, as seen in comparative testing and originally described in the present application. In view of these unexpected results, it is submitted that a factual showing which would render the claimed subject matter, as a whole, obvious to one having ordinary skill in the art at the time the invention was made, has not been met. Accordingly, a prima facie case of obviousness has not been established. The aforementioned comparative testing is demonstrative of nonobviousness and the unexpected results are clearly, directly attributable to the presence of the high solid fat index lipid layer, as set forth in amended claim 1. Additional details with respect to the comparative testing are provided in the declaration of Alvin Kershman, submitted herewith, for consideration by the Examiner.

Claims 2 and 4-27 each depend either directly or indirectly from and therefore include the limitations of amended claim 1. Accordingly, it is respectfully submitted that each of these claims is also patentable over the art of record for at least

the reasons set forth above with respect to claim 1. Further, each of these dependent claims places additional limitations on their parent and intermediate claims which, when considered in light of claim 1, further distinguish the claimed invention from the art of record.

As one example, claim 4 recites that the high solid fat index lipid is applied to form the outer high solid fat index layer having a thickness in the range of approximately 0.0041 inch to 0.039 inch. Claim 6 recites a layer thickness of approximately 1/32 inch, while claim 8 recites an application rate of approximately 0.2 to 0.3 grams per square inch. The Examiner asserts that it would be obvious to determine the thickness which would provide optimum protection for purposes of forming a moisture barrier. Initially, it is noted that Applicant's layer is not directed to serving as a moisture barrier and considers that the art of record fails to disclose the contemplated layer, as recited by amended claim 1. Further, Applicant is unable to find any teaching in the art of record, with respect to such layer thickness or application rate with respect to exposure to a toasting environment. In this regard, it is considered that there is no reasonable certainty that a layer that is applied for serving as a moisture barrier would have a constitution, thickness or application rate that is suited to reheating, as taught by the present invention. Applicant finds no teaching in Herzog with respect to coating thickness, even with respect to the savory coating that is taught. In this light, it is respectfully submitted that claims 4, 6 and 8 are allowable.

As yet another example, claim 9 requires grilling and cooling of the product before application of the high solid fat index lipid coating. That is, the product must be cooled to below the melting point of the high solid fat index lipid prior to the coating step. In this way, as described at page 6, lines 15-20 of the present application, limited absorption occurs. This application technique is thought to further enhance the functionality of the layer with respect to reheating. Applicant is unaware of this useful combination of steps in the prior art. The prior art merely teaches, for example, as seen Colvin, using a different, butter layer and its application only before grilling. Applicant finds no teaching with respect to a relationship between melting point of the applied material and the temperature of the item to which it is being applied. For at least these reasons, allowance of claim 9 is respectfully requested.

In a continuing example, claim 12 recites that the food product includes a product thickness and the coating step is performed to apply the outer high solid fat index layer at a coating thickness that is based, at least in part, on the product thickness. Claim 13 further recites increasing the coating thickness with relative increases in the product thickness. Applicant is unable to find any teaching, disclosure or suggestion in the art of record which relates to a layer directed to reheating and which is applied in proportion to the thickness of the product. The Examiner asserts that it would be obvious to use a coating thickness depending upon the end function wanted. Again, Applicant disagrees with this rationale since the particular function of the layer is considered as heretofore unknown. Accordingly, Applicant respectfully requests allowance of claims 12 and 13.

Claims 14 and 15, in combination, recite sealing peripheral edge portions of opposing farinaceous slices to one another by applying a sealing bead of farinaceous paste to the innermost surface of a first one of the opposing farinaceous slices surrounding a filling, positioning the innermost surface of the second one of the farinaceous slices against the innermost surface of the first farinaceous slice along with the farinaceous paste disposed thereon to spread the farinaceous paste across the peripheral edge portion, and cooking the food product in a predetermined way which bonds the first and second slices to one another with the sealing paste. Applicant finds no teaching or reasonable suggestion with regard to the

SK-3

12

USSN 09/912,219

use of a farinaceous paste in Partyka in this manner. Claim 16 adds a further requirement that the farinaceous paste is a mixture of approximately 46% flour and 54% water by weight upon application to the opposing farinaceous slices while claim 17 recites that the sealing bead includes a weight of approximately 8 grams upon application. In this regard, Partyka teaches the use of a hydrocolloid adhesive. The Examiner again states that it is known in the art to use flour as an adhesive and it would have been obvious to one of ordinary skill in the art to use alternative ingredients to carry out the same function. It appears to Applicant that the Examiner is relying on Official Notice in order to make out this aspect of the claimed combination. If this is the case, Applicant respectfully traverses the rejection on these grounds and requests an express showing of documentary proof, or an affidavit, as required by MPEP § 2144.03, in the event the rejection is maintained on these grounds. Thus, for at least the foregoing reasons, Applicant believes that claims 15-17 are patentable.

Claim 18 depends directly from claim 1 and requires dispersing additional solids in the high solid fat index lipid mixture prior to the coating step. Claim 19 depends directly from claim 18 and further recites that the additional solids include particles formed from a farinaceous mixture that is used to form the outermost farinaceous layer. In claim 20, prior to the coating step, the food product is grilled to provide a desired appearance of the outermost surfaces, and prior to dispersing the particles in the high solid fat index lipid mixture, the particles are treated in a way that is intended to maintain the desired appearance of the coated portions of the outermost surfaces when the food product is reheated in a toasting environment. The Examiner relies on Coleman with respect to these limitations. Applicant respectfully disagrees. Initially, it is noted that Coleman is directed to producing a browned appearance of a product that is cooked in a microwave oven. As described at page 12, lines 1-4 of the present application, microwave oven heating is undesired at times, as described at page 12, lines 1-4 of the present application, since it can change the product appearance, in and by itself. Claim 20, however, is directed to maintaining an appearance, subject to a toasting environment, that is previously produced through grilling. Applicant considers that Coleman teaches nothing in this regard at least for the reasons that (1) the Coleman product is not grilled prior to microwave heating and (2) Coleman is not directed to maintaining a previously produced appearance, but rather to producing a completely new appearance. The Examiner's rationale with respect to these limitations is not understood. Apparently, the Examiner believes that these limitations are rendered obvious by the application of microwave energy in a way that does not alter exterior product appearance, but admits, at the same time that direct heating, as taught by Partyka, results in the function of browning and crisping. Applicant is attempting to avoid browning to maintain a desired, pre-established appearance in a toasting environment and is unrelated to microwave heating. Partyka, and the remaining art of record, are submitted to teach the exact opposite-- producing a browned appearance. Applicant submits that this proposed combination is not reasonable. Accordingly, for at least these reasons, Applicant respectfully submits that these claims are allowable over the art of record in any reasonable combination.

Claim 21 recites reheating the food product from a frozen state. As described at page 9, lines 11-24 of the present application, a product reheats in a highly advantageous way, in accordance with the claimed invention, even from a frozen state. In this way, the frozen product is reconstituted (see page 10, line 11 of the present application) such that it appears to have been just freshly prepared. Applicant submits that the art of record is completely devoid of these steps in any reasonable combination. For at least these reasons, allowance of claim 21 is respectfully requested.

As another example, claim 22 recites forming a peripheral edge portion of the product including the outermost farinaceous layer in way that is intended to limit burning of the peripheral edge portions of the food product while reheating

in a toasting environment. The Examiner states that the limitation of this claim is met by the Partyka reference, since the claim does not define what "forming" entails. Applicant respectfully disagrees. The limitation is claimed in concise functional language which is fully supported by the specification. Applicant is unable to find any teaching relating to such a configuration in the art of record. This feature is considered to be highly advantageous and is heretofore unknown by Applicant. For at least these reasons, allowance of claim 22 is respectfully requested.

As still another example, claim 23 requires, prior to the coating step, grilling the food product to provide a desired appearance, and formulating the coating in a way that is intended to maintain the desired appearance when the food product is reheated in a toasting environment. As discussed above, this feature is considered to be highly advantageous and is heretofore unknown by Applicant with respect to the prior art.

Claim 24 recites inclusion of a hard butter, maltodextrin and added solids in the highly advantageous coating mixture of the present invention. Claim 25 further limits the added solids to include particles formed from the same farinaceous mixture from which the outermost farinaceous layer is also formed. Claim 26 further includes the steps, prior to the coating step, of grilling the food product to provide a desired appearance, and preparing the particles in a way that is intended to maintain the desired appearance when the food product is reheated. Applicant is unaware of these features in the prior art, as discussed above, in relation to maintaining a desired product appearance. It is considered that the mere suggestion of the use, for example, of bread crumbs in the Coleman and "Snacks and Sandwiches" references fails to reasonably teach, disclose or suggest the claimed method, particularly in view of the heretofore unknown and highly advantageous reheating characteristics of the high solid fat index layer of the present invention. Moreover, it is noted that the bread crumbs are added based on the characteristics of this reheating layer itself, as described, for example, at page 7, lines 21-26 of the present application, in view of the pre-reheated, opaque appearance of the layer.

Claim 27 recites a reheatable food product produced by the method of Claim 1. It is respectfully submitted that the art of record, in any reasonable combination, is devoid of such a product.

Turning now to the rejection of independent claim 28, a method is recited in which cooking the reheatable food product is performed to provide a desired appearance of the outermost surfaces. A coating mixture is mixed which is directed to causing the desired appearance of the product to be generally maintained as a result of exposure to a toaster environment including the step of adding particles to the mixture that are intended to enhance a post reheating appearance after the food product is reheated. At least portions of the outermost surfaces are then coated with the coating mixture. Applicant is unable to find any teaching, disclosure or suggestion in the art of record, in any reasonable combination, relating to a coating mixture that is used to maintain a desired, cooked appearance of a product when that product is exposed to a toasting environment. As discussed above, the prior art teaches the production of an altered appearance (i.e., browning) as opposed to maintaining a desired appearance. Microwave oven heating is undesired, as described at page 12, lines 1-4 of the present application, since it can change the product appearance, in and by itself. Thus, for at least the foregoing reasons, Applicant believes that claim 28 is patentable.

Claim 29 is an independent claim which reflects the limitations of claim 1, but in apparatus form. Accordingly, the arguments made above with respect to the patentability of amended claim 1 over the art of record reference are equally

applicable with respect to the patentability of claim 29. Accordingly, for at least these reasons, allowance of amended claim 29 is respectfully requested.

Claims 30-45 each depend either directly or indirectly from and therefore include the limitations of claim 29. Accordingly, it is respectfully submitted that each of these claims is also patentable over the art of record for at least the reasons set forth above with respect to claim 29. Further, each of these dependent claims places additional limitations on their parent and intermediate claims which, when considered in light of claim 29, further distinguish the claimed invention from the art of record.

For example, claims 32 and 33 include limitations which are similar to those present in claims 4 and 6, respectively, but in method form. It is submitted that claims 32 and 33 are each allowable at least for the reasons given above with respect to claims 4 and 6. Accordingly, allowance of claims 32 and 33 is respectfully requested.

Claims 38 and 39, in combination, recite a sealant substantially surrounding the filling to bond the pair of outermost farinaceous layers to one another in a way that is intended to seal the filling between the outermost farinaceous major layers wherein the sealant is formed from a farinaceous paste. Claim 40 adds a further requirement that the farinaceous paste is a mixture of approximately 46% flour and 54% water by weight upon application to the opposing farinaceous slices. Applicant finds no teaching or reasonable suggestion with regard to the use of a farinaceous paste in the art of record. In this regard, the Examiner admits that Partyka fails to disclose the use of a sealant comprising flour and water. The Examiner then states that Partyka teaches a different sealant material and suggests that it is known in the art to use flour as an adhesive and it would have been obvious to one of ordinary skill in the art to use alternative ingredients to carry out the same function. It appears to Applicant that the Examiner is relying on Official Notice in order to make out this aspect of the claimed combination. If this is the case, Applicant respectfully traverses the rejection on these grounds and requests an express showing of documentary proof, or an affidavit, as required by MPEP § 2144.03, in the event the rejection is maintained on these grounds. Thus, for at least the foregoing reasons, Applicant believes that claims 38-40 are patentable.

Applicant will now address the rejections of claims 48-53 since these claims include additional limitations which are believed to clearly distinguish over the art of record. As noted above, with respect to these claims, the Examiner has asserted that the broad arguments present in the Final Office Action are equally applicable to these claims. Applicant respectfully disagrees, at least for the reasons given immediately hereinafter.

Independent claim 48 recites:

In producing a reheatable food product including an outermost farinaceous layer defining one or more outermost surfaces, a method comprising the steps of:
coating at least a portion of the outermost surfaces with a high solid fat index lipid mixture to form a high solid fat index layer on said portion of the outermost surfaces, said high solid fat index lipid mixture being formulated with at least 60 percent of a hard butter by weight. (emphasis supplied)

In attempting to meet these limitations, the Examiner apparently relies on Partyka as described above with respect to claim 1 and apparently that the references are combinable on the basis of the functionality rationale described above and with which Applicant disagrees.

SK-3

15

USSN 09/912,219

The Examiner asserts that Herzing shows the fat "as claimed." Applicant disagrees. What Herzing teaches, when viewed as a whole, is the use of a matrix forming amount of hard butter. Applicant considers that this amount of hard butter is insufficient for the intended purpose, as taught by the present application. In this regard, Herzing limits the hard butter content at column 8, lines 17-18 to about 25-50% by weight of the total composition, and prefers about 30-40%.

It is again submitted that a reheatable product that supports a coating, having only a matrix forming amount of hard butter, will burn upon toaster reheating, since the primary properties of such a matrix layer are attributable to the added ingredients, rather than the hard butter. That is, the dominant percentage of added ingredients will burn, assuming that they are combustible. In contrast, claim 48 recites at least 60% of a hard butter by weight. The Examiner appears to believe that the mere presence of a hard butter in (1) a savory coating and (2) in a matrix forming amount, as taught by Herzing, is sufficient to support a combination with the remaining art of record in attempting to meet the limitations of claim 48. Again, it is considered that this rejection improperly singles-out the mere presence of a hard butter in the Herzing coating in a way which fails to consider what the reference fairly teaches as a whole, in order to support a conclusion of obviousness. Clearly, there is no teaching in Herzing which reasonably suggests the layer recited by claim 48. Applicant would have no motivation to look to Herzing in view of the fact that Herzing teaches an amount of hard butter which leads one directly away from Applicant's discovery. The amount of hard butter that is recited by claim 48 is clearly excluded.

Unlike Herzing, the high solid fat index layer of the present invention does not impart pleasant eating characteristics prior to reheating, savory or otherwise, but rather, an opaque appearance which would lead one directly away from applying such a layer to a product in the absence of some specific motivation to do so. For all of these reasons, it is submitted that Herzing is fatally flawed as a reference. Further, the art of record fails to disclose, teach or suggest the limitations of claim 48 in any reasonable combination. Therefore, allowance of claim 48 over the art of record is respectfully requested.

As described above, the patentability of the claims, in general, and claim 48, in particular, is further supported on the basis of the wholly unexpected behavior of the high solid fat index lipid layer, as seen in comparative testing and described in the present application. Further, details with respect to the comparative testing are provided in the declaration of Alvin Kershman, submitted herewith, for consideration by the Examiner.

Claim 49 depends directly from and therefore includes the limitations of claim 48. Accordingly, it is respectfully submitted that claim 49 is also patentable over the art of record for at least the reasons set forth above with respect to claim 48. Further, this dependent claim places additional limitations on claim 48 which further distinguish the claimed invention from the art of record. Specifically, claim 49 recites that the high solid fat index lipid mixture is formulated with at least 60 percent to 80 percent of a hard butter by weight.

Turning now to independent claim 50, a high solid fat index layer is produced which consists essentially of a high solid fat index lipid. Thus, there can be no added materials in the layer which would materially affect the basic and novel characteristics of the layer. These characteristics are, of course, related to the behavior of the layer during reheating as described throughout the present application. In this regard, Applicants are not aware of any other material which provides these characteristics. In fact, the layer was tested with no added ingredients during comparative testing. For all of these reasons, it is considered that the arguments made above, with respect to the patentability of claim 48 over the art of record

are equally applicable with respect to the patentability of claim 50. Accordingly, allowance of claim 50 is respectfully requested.

Claim 51 is an independent claim which reflects the limitations of claim 50, but in apparatus form. Accordingly, it is considered that the arguments made above with respect to the patentability of claim 50 over the art of record are equally applicable to the patentability of claim 51. Accordingly, allowance of claim 51 is respectfully requested for at least this reason.

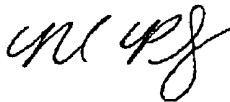
Claim 52 is an independent claim which reflects the limitations of claim 48, but in apparatus form. Accordingly, it is considered that the arguments made above with respect to the patentability of claim 48 over the art of record are equally applicable to the patentability of claim 52. Accordingly, allowance of claim 52 is respectfully requested for at least this reason.

Claim 53 depends directly from and therefore include the limitations of claim 52. Accordingly, it is respectfully submitted that claim 53 is also patentable over the art of record for at least the reasons set forth above with respect to claim 52. Further, this dependent claims places additional limitations on claim 52 which further distinguish the claimed invention from the art of record. Specifically, claim 52 recites that the high solid fat index lipid mixture is formulated with at least 60 percent to 80 percent of a hard butter by weight.

For the foregoing reasons, it is respectfully submitted that all of the Examiner's objections have been overcome and that the application is in condition for allowance. Hence, allowance of these claims and passage to issue of the application are solicited.

If the Examiner has any questions concerning this case, the Examiner is respectfully requested to contact Mike Pritzkau at 303-410-9254.

Respectfully submitted,



Michael M. Pritzkau
Reg. No. 37,913